ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Chibardun Telephone Cooperative, Inc.,	)	
CTC Telcom, Inc.	)	
	)	CC Docket No. 97-219
Petition for Preemption Pursuant to Section 253	)	
of the Communications Act of Discriminatory	)	
Ordinances, Fees and Right-of-Way Practices	)	
of the City of Rice Lake, Wisconsin	)	

TO: The Commission

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

NATIONAL LEAGUE OF CITIES
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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SUMMARY OF ARGUMENT

The National League of Cities and the National Association of Telecommunications Officers and Advisors herewith submit their Reply Comments concerning the "Petition for Section 253 Preemption" filed by Chibardun Telephone Cooperative, Inc. and CTC Telcom, Inc. (collectively "Chibardun") against the City of Rice Lake, Wisconsin ("City"). Although it appears from the face of Chibardun's Petition that there is no merit to its request to preempt certain actions of the City, the more complete recital of the relevant facts contained in Rice Lake's Comments demonstrates that not only is there no basis upon which the Commission can grant Chibardun's Petition, but that Chibardun omitted significant and materially relevant information in its Petition and has otherwise failed to proceed in good faith.

Chibardun failed to inform the Commission that it cancelled its proposed telecommunications project in Rice Lake four months before it filed its Petition, and after it gave the City less than three weeks to process right-of-way permit applications that proposed more than six miles of construction throughout the City. This is symptomatic of a course of conduct which raises the implicit question whether Chibardun has a hidden agenda or motive. Further examples of such conduct include Chibardun's requesting to appear before the Rice Lake Common Council concerning the *denial* of its permit applications the day after Chibardun filed the applications, refusing to provide basic information the City requested concerning Chibardun's proposal -- much of which it provided to another community, and refusing even to discuss a *draft* License Agreement that would have allowed Chibardun to begin construction of its project.

The relief which Chibardun seeks, the Commission's preemption of the draft License Agreement, an interim Ordinance that modified the procedures for obtaining City consent to major right-of-way construction projects (adopted more than two months after Chibardun

cancelled its proposed project), a yet-to-be adopted comprehensive right-of-way ordinance, and some potential future action the City might take, is ungrantable.

First, the Commission has no jurisdiction to reach the merits of Chibardun's Petition. The matters which Chibardun raises concern exclusively right-of-way management and compensation issues for which the Commission has no preemption authority under Section 253(d) of the Telecommunications Act of 1996. Congress specifically deprived the Commission of preemption authority over such matters, requiring that Federal district courts resolve the type of issues that Chibardun has raised.

Second, even if the Commission determined that it had jurisdiction to consider Chibardun's Petition, Chibardun has failed to meet its burden of proof. Chibardun has not shown that the City's actions prohibited or effectively prohibited Chibardun's entry into the Rice Lake market or that the matters it seeks to have preempted do not fall within the authority preserved to local governments under Section 253(c) of the Act. There is no evidence that the City has prohibited or effectively prohibited Chibardun's entry. Rather, it is Chibardun's own unreasonable conduct, including waiting until virtually the last minute before filing its permit applications, which accounts for Chibardun's failure to meet a self-imposed June 1 "go-no-go" deadline for starting its project. Further, each of the matters about which Chibardun complains relates directly to the City's exercise of its right-of-way management authority under Section 253(c). Chibardun's assertion that the City has discriminated against it is demonstrably untrue, particularly given that the City has required the incumbent cable service provider to comply with the interim Ordinance and provided it with a draft agreement substantially similar to the draft License Agreement the City provided to Chibardun.

Finally, Chibardun asserts that the City cannot impose upon it any requirements that it did not impose on the incumbent service providers. Thus, Chibardun attacks and seeks to limit or preclude the ability of Rice Lake and other cities to amend and update their right-of-way ordinances and regulations as circumstances warrant. This has become an increasingly vital responsibility for local governments in response to the emerging post-1996 Act telecommunications landscape of new service providers, increased competition and rapidly changing technologies, which places new and increased pressures on the public rights-of-way. Section 253(c) preserves local government authority to react to these changing circumstances. Both the Commission and federal courts recognize that local governments have the flexibility and authority to adopt new laws and procedures to preserve the physical integrity of the public rights-of-way and to protect the health and safety of their citizens.

The record in this proceeding demonstrates that Chibardun has not acted in good faith. If Chibardun had filed its Petition in federal district court, as Congress intended, it would be subject to sanctions for filing an abusive or frivolous claim that has forced the small, rural community of Rice Lake to expend considerable resources defending itself against Chibardun's baseless charges. The Commission should dismiss or deny Chibardun's Petition in the strongest terms possible.

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REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

The National League of Cities ("NLC") and the National Association of Telecommunications Officers and Advisors ("NATOA"), by their attorneys, hereby submit these reply comments concerning the "Petition for Section 253 Preemption" ("Petition") filed on October 10, 1997, by Chibardun Telephone Cooperative, Inc. and CTC Telcom, Inc. (collectively "Chibardun") against the City of Rice Lake, Wisconsin ("City").[1]

I. INTRODUCTION

NLC and NATOA did not file initial comments concerning Chibardun's Petition so that they could review the City's comments and have the benefit of each parties' perspective before addressing the merits of the Petition. Although it appeared from the face of the Petition that

[1] By Order, DA 97-2658, released December 19, 1997, the Commission extended the period for filing reply comments until January 6, 1998.

Chibardun's request for preemption was flawed, the City's Comments, and particularly the more complete factual history of the dispute contained therein, demonstrate that not only is Chibardun's Petition not grantable, but that Chibardun has not proceeded in good faith and has lacked candor in failing to provide the Commission with all the relevant facts.[2] The record demonstrates that not only did Rice Lake *not* prohibit Chibardun's entry, but the City made every reasonable effort to accommodate Chibardun's unreasonable time demands for City action even after Chibardun refused to respond to the City's reasonable requests for additional information.

Indeed, the record raises a question why Chibardun chose to proceed in the manner it did and its motives for doing so. Some of the more pertinent facts include Chibardun's: (1) filing applications for right-of-way permits to install an entirely new telecommunications infrastructure in the City's rights-of-way only 11 days before Chibardun's self-imposed "go-no-go" deadline; (2) submitting a written request to appear before the Rice Lake Common Council concerning the *denial* of Chibardun's right-of-way permits only one day after filing the permit applications; (3) refusing to discuss or negotiate with the City a *draft* License Agreement that would have allowed Chibardun to begin construction in the City's rights-of-way while the City evaluated and amended its right-of-way ordinances; (4) refusing to provide Rice Lake with information which the City requested pertaining to Chibardun's cable plans even though Chibardun provided similar information to another community; (5) cancelling its project after giving the City *less* than three weeks to process the right-of-way permit applications; and (6) filing its Petition four months after

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[2] Chibardun ignored the Commission's direction that parties should support factual assertions with credible evidence, including affidavits. See TCI Cablevision of Oakland County, Inc., FCC 97-331, released September 19, 1997, at para. 77, n. 198. Chibardun provided no affidavits in support of its Petition and selectively attached a handful of documents which provide neither a complete nor accurate account of the relevant facts.

it cancelled the project and notified the City that it intended to seek Commission preemption.[3]

Incredibly, Chibardun alleges that the City has continued to refuse "to process and grant [the] excavation permit applications for more than four months" (Petition at 18), when Chibardun explicitly told the City on June 9, 1997, that it had cancelled the project. See June 9 Vergin Letter. Nowhere in its Petition does Chibardun mention this fact. The Commission should not condone such a lack of candor.

The record provides no basis upon which the Commission can or should grant any part of Chibardun's Petition. First, the issues Chibardun raises are exclusively right-of-way management issues. The City's actions fall squarely within the authority preserved to local governments in Section 253(c) of the Communications Act, 47 U.S.C. Section 253(c), and the Commission has no jurisdiction to preempt the City's actions under Section 253(d), 47 U.S.C. Section 253(d).

Second, there is no evidence that any City ordinance, action or requirement has prohibited Chibardun's entry into the Rice Lake market. Chibardun chose to proceed in the manner it did. It had a self-imposed June 1, 1997, deadline for City action, but then waited until virtually the last minute to file its permit applications. It then cancelled the project less than three weeks after it filed the applications. Once Chibardun told the City it had cancelled its plans there was nothing further for the City to do with respect to the permit applications. The events subsequent

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[3] See generally Rice Lake Comments, Attachment A, Affidavit of Curtis Snyder ("Snyder Affidavit"), including Exhibit 3 (the June 9, 1997, letter from Rick Vergin, Chibardun's General Manager to Rice Lake Mayor Franklin P. Ferguson and City Administrator Curtis E. Snyder, hereafter the "June 9 Vergin Letter") and Exhibit 9 (the May 21, 1997, letter from Mr. Vergin to Mr. Snyder, hereafter the "May 21 Vergin Letter"); Attachment B, Affidavit of Mick Givens ("Givens Affidavit") at para. 23.

to Chibardun's June 9 cancellation notice did not prohibit Chibardun's entry because it was no longer seeking entry, and the City's interim Ordinance did not prohibit entry in any event.

Third, Chibardun directly challenges Rice Lake's ability, and thereby the ability of any local government, to undertake a self-assessment of its ordinances and regulations and amend those requirements when locally elected government officials determine that the existing ordinances no longer adequately protect the public interest in maintaining the health and safety of its citizens and managing the infrastructure of the City's streets and rights-of-way. Not only does Chibardun request the Commission to preempt the City's on-going efforts to manage its rights-of-way in the face of new competition and demands on the City's infrastructure, but it also seeks preemption of an Ordinance the City has not yet adopted and undefined future activities that Chibardun perceives as discriminatory.[4] The Commission has no authority to so intrude on local government authority and the legislative process.

II. THE FCC LACKS JURISDICTION TO ADDRESS THE RIGHT-OF-WAY MANAGEMENT MATTERS RAISED IN CHIBARDUN'S PETITION

The matters which Chibardun requests the Commission to preempt relate exclusively to right-of-way management and compensation. Chibardun's allegations focus primarily on the City's unwillingness to "rubber stamp" Chibardun's permit applications to construct a new telecommunications infrastructure throughout the City's rights-of-way, a draft License Agreement intended as a starting point for an interim agreement for Chibardun's use of the rights-of-way until the City adopted a comprehensive right-of-way ordinance, and an Ordinance (adopted more

[4] See Petition at 24-25.

than two months after Chibardun cancelled its project) that required the City's Common Council to approve any right-of-way project with a value of $50,000 or more.

Each of these matters is encompassed within the scope of local government authority to manage and obtain compensation for the use of the rights-of-way which is preserved under Section 253(c), and for which the Commission has no preemption authority under Section 253(d). Section 253(d) limits the Commission's preemption authority only to matters under Section 253(a) or Section 253(b):

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Section 253(d) does not give the Commission the authority to preempt matters falling within Section 253(c).

Congress intentionally denied the Commission preemption authority as to right-of-way management and compensation issues. The preemption authority granted the Commission in Section 253(d) resulted from a compromise amendment introduced in the Senate as an alternative to an amendment that would have eliminated entirely any Commission preemption authority.[5] Senator Gorton, who introduced the compromise amendment, described its intent and result:

> There is no preemption ... for subsection (c) ... which preserves to local governments control over their public right of way. It accepts the proposition ... that these local powers should be retained locally, *that any challenge to them take place in the Federal*

[5] Section 253 of the 1996 Act is based on Section 254 of the Senate Bill. The House version of the bill did not grant the Commission any preemption authority. See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 127 (1996).

> *district court in that locality and that the Federal Communications Commission not be able to preempt such actions.*

141 Cong. Rec. S 8213 (Daily Ed. July 13, 1995) (June 13, 1995) (remarks of Sen. Gorton) (emphasis added). During the floor debate prior to final passage of the 1996 Act, Congresswoman Pelosi described the effect of Section 253(d):

> As for the issue of FCC preemption, I am pleased that the committee agreed to support the Senate language which authorizes the Commission to preempt the enforcement only of State or local requirements that violate subsection (a) or (b), *but not (c). The courts, not the Commission, will address disputes under section 253(c).*

141 Cong. Rec. H 1174 (Daily Ed. Feb. 1, 1996) (remarks of Congresswoman Pelosi) (emphasis added). Thus, both the language of the Act and the legislative history are explicit with respect to the Commission's lack of authority to preempt matters under Section 253(c).

Section 253(c) preserves the historic authority of states and local governments to manage the public rights-of-way. These are local matters that involve each community's unique circumstances with respect to the design, use and condition of its streets and public-rights-of-way, as well as the legal relationships between each state and its local governments.[6] Beyond the specific limitations on the Commission's preemption authority in Section 253(d), there are other restrictions on the Commission's authority over traditional state and local matters which further limit the Commission's ability to preempt state and local regulations. Section 601(c) of the 1996 Act, entitled "Federal, State, and Local Law," provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided* in such Act or amendments" (emphasis added). Thus, state and local

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[6] Generally, local governments obtain their authority from the state.

government authority is preserved unless Congress expressly grants the Commission authority to intercede in state or local matters. Congress specifically refused to grant such authority with respect to state and local government right-of-way authority.

Further, Section 2(b) of the Act[7] has served as a cornerstone of the limitations on Commission authority to intercede in local matters since its initial adoption more than 60 years ago. See e.g., Iowa Utilities Board v. FCC, 120 F.3d 753, 796 (8th Cir. 1997). The courts have emphasized the need to interpret narrowly federal laws impacting areas of historic local government regulation. See e.g. CSX Transportation v. Easterwood, 507 U.S. 658, 664 (1993) ("a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption"); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[T]he historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); and Time Warner Cable v. Doyle, 66 F. 3d 867, 874 (7th Cir. 1995). ("[T]he Supreme Court has instructed us to be reluctant in finding federal preemption of a subject traditionally governed by state law").

Congress was "capable of clearly expressing its desire to grant the FCC authority over" local right-of-way matters if it intended to do so. See Iowa Utilities Board, 753 F.3d at 795. It did not. The explicit language of the 1996 Act and the manifest Congressional intent deprive the Commission of preemption authority with respect to Section 253(c) and the traditional authority of state and local governments to manage the public rights-of-way and to receive compensation for their use.

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[7] 47 U.S.C. Section 152(b).

III. CHIBARDUN HAS FAILED TO MEET ITS BURDEN OF PROOF

A. Rice Lake Has Not Prohibited Entry

Even if the Commission somehow determined that it had jurisdiction to consider Chibardun's preemption request, Chibardun has the burden of proving that the City's requirements constituted a prohibition or effective prohibition on entry under Section 253(a). TCI Cablevision at para. 101. Chibardun has not met this burden. Neither the Rice Lake Common Council, the City Administrator, nor any other City official or representative took any action which denied Chibardun entry into the Rice Lake market. To the contrary, it was Chibardun that refused to negotiate with the City an agreement to use the rights-of-way.[8] See Rice Lake Comments at 19. It was Chibardun who, less than three weeks after filing its right-of-way permit applications, notified the City that it had cancelled the project.[9]

Once Chibardun notified the City that it had cancelled the project the City had no reason to further process the permit applications. Chibardun did not state that it was postponing the project and that it still intended to go forward in 1998. Rather, Chibardun stated that it was *cancelling* the project and *might* have an interest in providing service at some indefinite time in the future depending on how Chibardun perceived the circumstances at that time. See June 9

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[8] Chibardun refused to discuss the draft agreement even after the City proposed that Chibardun sign the agreement under protest and subject to any preemption decision that Chibardun might obtain from the Commission, a proposal which the City made to allow Chibardun to begin construction of its project in the summer of 1997. Chibardun never responded to this offer. See Rice Lake Comments, Snyder Affidavit at para. 18 and Exhibit 10 (June 23, 1997, letter from Curtis E. Snyder, City Administrator to Richard Vergin, General Manager, CTC Telcom).

[9] While Chibardun gave the City less than three weeks, it took Chibardun more than six weeks to file the permit applications after publicly announcing its plans on April 5. See Petition at 3, 8.

Vergin Letter at 2. Because Rice Lake cancelled the project on June 9 and had no plans to provide service, there was no reason for the City to thereafter continue processing Chibardun's permit applications.

This situation is similar to TCI Cablevision, supra, and California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California, FCC 97-251, released July 17, 1997 ("Huntington Park"). In those cases the Commission determined that the record failed to support a finding that there was a prohibition on entry that violated Section 253(a). As was the situation in TCI Cablevision and Huntington Park, Rice Lake did not expressly prohibit Chibardun's entry, nor did the City deny a franchise application for telecommunications service.[10] Also similar to the situation in TCI Cablevision, Chibardun has stated that it has no immediate plans to provide telecommunications service in Rice Lake. See TCI Cablevision, supra at para. 99; June 9 Vergin Letter.

Nor has the City materially inhibited or limited Chibardun's ability to compete in a fair and balanced legal and regulatory environment. See TCI Cablevision, supra at para. 98, citing Huntington Park at para 31. The City took no action that materially inhibited or limited Chibardun's entry. The License Agreement which Chibardun requests the Commission to preempt was a *draft* document intended for further discussion and negotiation between the City and Chibardun to establish the terms and conditions that would apply to Chibardun's use of the rights-of-way until the City passed its comprehensive right-of-way Ordinance. The Commission

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[10] Although Chibardun's interest in providing cable television service and its efforts to obtain a cable franchise are discussed at length in both the Petition and the City's Comments, those facts are irrelevant to the substance of Chibardun's preemption request under Section 253(a). As the Commission has stated, the Communications Act distinguishes between the regulation of cable television and telecommunications services. See TCI Cablevision, supra.

has recognized that state and local governments may "impose non-discriminatory and competitively neutral conditions or requirements that are necessary to manage the public rights-of-way." Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems), Second Report and Order, 11 FCC Rcd 18223, 18331 (1996) (footnote omitted). Although the City was prepared to negotiate and modify the agreement, Chibardun refused even to discuss with the City the draft document and any concerns that it had or changes it believed were appropriate. See Rice Lake Comments at 19-21. Before Chibardun can seek preemption of the draft License Agreement it must make a good faith effort to reach an agreement with the City. See Petition of Hughes Network Systems, Inc, 12 FCC Rcd 9640, 9650 (I.B. 1997) ("[petitioner] must make a good faith effort at securing a permit before petitioning the Commission").

Chibardun also challenges Rice Lake Ordinance No. 849. The City's Common Council adopted this interim Ordinance more than two months after Chibardun cancelled its project and told the City that it had no immediate plans to provide telecommunications service in Rice Lake. Because the City adopted the Ordinance after Chibardun cancelled its project the Ordinance could not have constituted a prohibition or effective prohibition on Chibardun's entry. Even if the Ordinance applied to Chibardun's project, nothing in the Ordinance prohibited or prohibits Chibardun's entry, or would materially inhibit or limit Chibardun's ability to compete. Rather, the Ordinance simply established a new, interim procedure applicable to *all* right-of-way users that requires the Common Council's prior approval for any right-of-way project with a value of

$50,000 or more.[11] The City has since applied the Ordinance in a non-discriminatory manner to the incumbent cable service provider, Marcus Cable. See Rice Lake Comments at 57.

The other City actions which Chibardun requests the Commission to preempt are prospective only -- an as yet unadopted comprehensive right-of-way ordinance and any other future action the City might take which Chibardun considers anticompetitive or discriminatory. See Petition at 24-25. Certainly, actions which the City has not yet taken cannot constitute a prohibition or effective prohibition on entry. As discussed further in Part IV, it is entirely inappropriate and beyond the Commission's authority to interfere in the local legislative process as would occur should it attempt to preempt the Rice Lake Common Council's deliberative process as it considers adopting a new, comprehensive right-of-way ordinance.

B. The City's Actions Are Exempt From Section 253(a).

Even if Chibardun could show that a prohibition on entry existed, which it did not, all of the matters about which it complains are exercises of preserved right-of-way authority under Section 253(c). Section 253(c) is a safe harbor from the proscription of Section 253(a). That is, if a state or local government requirement falls within the scope of Section 253(c), then it is exempt from Section 253(a). See TCI Cablevision, supra at paras. 97, 101; The Public Utility Commission of Texas, FCC 97-346, released October 1, 1997, at paras. 43-44 (Section 253(c) carves out a defined area in which states and local governments may regulate or continue to regulate subject to certain conditions irrespective of subsection (a)). Chibardun has the burden of proving that the requirements it seeks to have preempted do not fall within Section 253(c).

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[11] The Ordinance applies only until the City adopts a comprehensive right-of-way ordinance, or for four months, whichever occurs first.

TCI Cablevision at para. 101.

Chibardun has not met this burden. The Commission has enumerated various types of activities that fall within the scope of right-of-way management authority. Classic Telephone, Inc., 11 FCC Rcd 13082, 13103 (1996); Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems), Second Report and Order, 11 FCC Rcd 18223, 18330 (1996).[12] These activities include:

> (1) coordinating construction schedules;
>
> (2) establishing standards and procedures for constructing lines across private property;
>
> (3) determining insurance and indemnity requirements and requiring a company to indemnify a city against any claims of injury arising from excavation activities;
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> (4) establishing rules for local building codes;
>
> (5) scheduling common trenching and street cuts;
>
> (6) repairing and resurfacing construction-damaged streets;
>
> (7) ensuring public safety in the use of rights-of-way by gas, telephone, electric, cable and similar companies;
>
> (8) keeping track of the various systems using the rights-of-way to prevent interference among facilities;
>
> (9) regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or

[12] The NLC and NATOA believe that the Commission has too narrowly described activities that properly fall within the scope of right-of-way management under Section 253(c). The Commission has described these activities in different orders (cited in the text) relying on different *examples* of activities that several parties, including the NLC and NATOA, have provided in various contexts. However, this disagreement is irrelevant to the merits of Chibardun's Petition inasmuch as the matters about which Chibardun complains fall within the scope of right-of-way management authority as the Commission has thus far described it.

minimize notice impacts;

(10) requiring companies to place their facilities underground, rather than overhead, consistent with requirements imposed on other utilities;

(11) requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation; and

(12) enforcing local zoning regulations.

Rice Lake demonstrates in its Comments that the specific matters which Chibardun cites as alleged prohibitions on entry, or about which it complains, are encompassed within one or more of the above listed management functions or activities, or concern compensation for use of the City's rights-of-way.[13] See Rice Lake Comments at 45-49, 54-56; see also Comments of CMMT Communities, filed December 2, 1997, at 4-6 (demonstrating that the matters Chibardun cites address typical right-of-way management issues).[14]

Similarly, the information the City requested from Chibardun but which Chibardun refused to provide, related directly to the City's ability to manage its rights-of-way. Chibardun planned to construct a new telecommunications infrastructure throughout Rice Lake. Because the City had no prior experience with Chibardun it was entirely appropriate for the City to request Chibardun to provide additional information relevant to its proposed plans.

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[13] Rice Lake also demonstrates that Chibardun has exaggerated or misstated some of the requirements which it asserts the City sought to impose.

[14] It is also important to remember that none of the terms set forth in the draft License Agreement were "imposed" on Chibardun. The draft License Agreement was intended as a starting point for discussions between the City and Chibardun that would lead to a final agreement acceptable to both parties. See Rice Lake Comments at 19-21. Because Chibardun refused to discuss the terms of the draft agreement with the City does not transform the provisions of that draft document into legal requirements imposed on Chibardun.

The information the City requested was basic: a description of Chibardun's proposed network; a construction timetable; projected service dates; a description of the type of services to be provided, the operating territory, and proposed charges; whether Chibardun had obtained approval from the Wisconsin Public Service Commission to provide service in Rice Lake; and whether Chibardun needed to negotiate an interconnection agreement with GTE (the incumbent telephone company). See Petition, Exhibit C, May 23, 1997, Letter from City Administrator Curtis Snyder to Rick Vergin, Chibardun General Manager.[15] In the context of Chibardun's plan to excavate more than 6 miles of the City's rights-of-way to construct an entirely new telecommunications system, it was appropriate for the City to understand what the system would encompass, when it would be built, how long construction would take, when service would begin, whether Chibardun had the requisite state approval to provide the service,[16] and whether it had reached or still needed to reach an interconnection agreement with GTE. These were not difficult questions to answer and they related directly to the City's ability to responsibly manage the use of its rights-of-way.

The information the City requested did not constitute an effort or signal that the City intended to regulate Chibardun's proposed service or its relationship with other service providers. Compare TCI Cablevision, supra at para. 105. It did not constitute a "third tier" of regulation, or an effort to establish a "third tier" of regulation as Chibardun perfunctorily asserts. Petition

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[15] Much of this letter pertains to Chibardun's interest in obtaining a cable television franchise, which is irrelevant to the issues in this proceeding.

[16] If Chibardun had no authority from the Wisconsin PSC to provide service in Rice Lake, there was no reason to allow Chibardun to tear-up the City's streets to install a system that it could not use.

at 20. The draft provisions of the License Agreement and the information the City requested are within the scope of the City's right-of-way management authority under Section 253(c). Simply inquiring whether Chibardun had or needed to reach an interconnection agreement with GTE does not rise to the level of regulating the relationship between Chibardun and GTE. Nor did the City's information request or draft License Agreement dictate the rates, terms or conditions under which Chibardun would offer its service. See TCI Cablevision at paras. 105-106.

Apparently recognizing that the requested information and draft License Agreement are within the City's right-of-way management authority, Chibardun asserts that the City's actions were discriminatory because Chibardun received different treatment than the City's incumbent telephone (GTE) and cable service (Marcus Cable) providers. Petition at 21-23. But Chibardun and the City's incumbent service providers are not in the same situation. Both GTE and Marcus Cable have long-standing working relationships with the City embodied in Marcus Cable's cable franchise agreement and GTE's long-term provision of service in the City and certification from the Wisconsin PSC. They long ago completed construction of their basic system infrastructures (or their predecessors did). To the extent Chibardun complains that the City did not act on its permit applications as quickly as it acted on earlier permit requests from Marcus Cable or GTE, neither Marcus Cable nor GTE proposed to install an entirely new communications infrastructure throughout the City, as did Chibardun.[17]

Non-discriminatory and competitively neutral treatment does not require equal treatment. Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems),

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[17] See Rice Lake Comments at 36. Further, unlike Chibardun's proposal to install an entirely new telecommunications system in a relatively short period, GTE's system infrastructure evolved over the past century or so since the first installation of telephone service in Rice Lake.

Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20310 (1996), appeal pending, sub nom. City of Dallas, Texas v. FCC, No. 96-60502 (5th Cir.). The Commission has recognized that imposing different requirements based on different circumstances is not discriminatory. Taking as an example one of the issues Chibardun raises -- insurance and indemnification requirements[18] -- the Commission has stated that it is not discriminatory to impose higher insurance requirements based on the number of street cuts an entity planned to make. Ibid. Thus, equal treatment is not required when parties are not similarly situated. This was precisely Chibardun's circumstance. Chibardun, a company with whom the City had no prior experience, proposed to install a completely new telecommunications infrastructure throughout the City requiring massive excavations of the rights-of-way that neither GTE nor Marcus Cable had proposed or undertaken in the recent past. Given the vastly different circumstances, the City's handling of Chibardun's permit applications was not discriminatory.

Chibardun also asserts that the draft License Agreement was discriminatory. However, because this was a draft document, intended as a starting point for discussions and negotiations between Chibardun and the City, the initial provisions of the draft document were not requirements "imposed" on Chibardun. Further, because the City provided a substantively similar agreement to Marcus Cable for a new construction project with a value in excess of $50,000, requesting Chibardun to negotiate and execute a license agreement was not discriminatory treatment.

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[18] Petition at 16, 22-23.

IV. CITIES MUST HAVE THE LEGISLATIVE FLEXIBILITY TO ADDRESS EVOLVING RIGHT-OF-WAY MANAGEMENT ISSUES FOLLOWING THE ADOPTION OF THE 1996 ACT AND THE ENTRANCE OF NEW TELECOMMUNICATIONS COMPETITORS INTO THE LOCAL MARKET

Implicit in Chibardun's Petition is an attack on the City's decision and ability to amend and update its existing ordinances governing right-of-way management and compensation issues. Chibardun focuses on the City's refusal to rubber-stamp its permit applications which it asserts the City has done in the past for GTE and Marcus Cable, and it challenges the City's adoption of interim Ordinance No. 849 requiring prior Common Council approval of major right-of-way projects while the City considers a comprehensive right-of-way ordinance. Chibardun apparently wants to "lock-in" the City's right-of-way management and compensation requirements as they existed at some point prior to adoption of the 1996 Act.[19] Not only does Chibardun challenge the City's interim Ordinance No. 849, but it also requests the Commission to preempt any future right-of-way ordinance before the City acts to adopt it, and any other future actions the City might take which Chibardun deems discriminatory or anticompetitive. The breadth and scope of Chibardun's preemption request is outrageous.

The Commission has no authority to interfere with the legitimate legislative processes of local government. There is nothing in Section 253 or anywhere else in the 1996 Act whereby Congress intended or authorized the Commission to preclude local governments from adopting

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[19] Chibardun's Petition is somewhat vague in that while Chibardun asserts that the City cannot subject it to entry requirements different than those that applied to GTE and Marcus Cable, Chibardun does not state precisely what the applicable requirements should be. Taken to its literal extreme, Chibardun's request describes the applicable requirements when the Rice Lake telephone system was first installed around the turn of the last century, at least for telephone purposes, while for cable television it could mean the requirements in effect when the City first granted a cable television franchise.

new laws and regulations, or amending existing laws and regulations governing the use of a city's rights-of-way. The purpose and effect of Section 253(c) is precisely the opposite -- to preserve such legislative flexibility for state and local governments. Because a city may have existing requirements governing the use of the rights-of-way does not preclude a city from changing its applicable ordinances and procedures when its locally elected or appointed officials determine that those requirements are no longer appropriate. That is precisely what has occurred here. Rice Lake, a small rural community in northwestern Wisconsin, had no reason to evaluate or consider amending its right-of-way ordinances until Chibardun came in proposing to install an entirely new telecommunications system throughout the City.

The passage of the 1996 Act changed forever the telecommunications landscape with its sweeping amendments of the Communications Act intended to foster a new era of competition with rapidly changing technology. The development of new telecommunications competition and technologies also means that cities now face increased pressures on the use of their rights-of-way. Cities must have the flexibility to adapt their governing ordinances and regulations to these changing conditions in the interest of protecting the public health and safety of their citizens and the present and future integrity of their infrastructures.

Cities that previously had a monopoly local phone company now face the possibility of multiple competitors entering their markets and the rights-of-way to provide new services. Ordinances enacted in the days of a monopoly service provider, whose facilities were long ago installed in the rights-of-way and are now subject mostly to routine maintenance, repair and occasional upgrading or expansion to new residential or business areas, may not adequately protect the public interest when new companies seek to excavate throughout a city to construct

entirely new telecommunications systems. Unlike the service providers, whose daily business focuses on telecommunications issues, for many if not most cities, and particularly their elected officials, these are new matters with which they have had infrequent experience and have little or no expertise. This is particularly true in smaller communities and markets where competition is slower to develop. The League of Wisconsin Municipalities and the Wisconsin Alliance of Cities, in its "Comments on Petition" filed December 2, 1997, describes how numerous Wisconsin cities have recently undertaken or are just now beginning to undertake an examination of their existing ordinances to determine whether they are adequate to the task of protecting and managing the public rights-of-way in a newly competitive telecommunications market. Many cities have concluded that they need to update their ordinances in response to the changed competitive and technological environment. See League of Wisconsin Municipalities Comments on Petition at 3-4, 6-7.

Chibardun asserts that the City cannot impose any new requirements that it did not impose on the incumbent service provider, and that to do so constitutes discriminatory treatment. However, examining existing requirements for right-of-way use, determining that those requirements are inadequate to address current or future city needs, and adopting new requirements to satisfy those needs is not discriminatory. Chibardun proposed to enter the Rice Lake market many decades after GTE (or its predecessor) began providing service. Rice Lake has shown that it will consider any new permit applications from new or incumbent users of the rights-of-way under the same procedures as it applied to Chibardun. No matter what the City does, it cannot now place Chibardun (or any other new entrant) in the same position as the incumbent provider. It can only treat would-be service providers without discrimination. See

Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996). This Rice Lake has done.

The Commission has recognized in the related context of wireless siting requests, that following passage of the 1996 Act cities may adopt and implement new procedures or requirements for handling such requests. See Public Notice, Supplemental Pleading Cycle Established for Comments on Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association, FCC 97-264, released July 28, 1997, at 3. Therein, the Commission tentatively concluded that adopting a fixed duration moratorium on the siting of new facilities to provide "local officials a reasonable period of time to study and develop a process for handling wireless siting requests may be a legitimate exercise of local land use authority which may benefit all parties."[20] Ibid.; see also Sprint Spectrum, L.P., 924 F. Supp. at 1040 (a moratorium is not a prohibition on entry nor does it have a prohibitory effect while a city studies changes to its local ordinances or regulations). The land use issues at stake with respect to the public rights-of-way are of critical concern to every municipality. "Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public

[20] Although Rice Lake could have placed a moratorium on requests for new right-of-way facilities for the several months it anticipated would be required to adopt a comprehensive right-of-way ordinance, it chose not to do so. Instead, the City began to process Chibardun's permit applications and drafted a License Agreement that would allow Chibardun to begin construction during the pendency of the City's review of its ordinances. That Chibardun refused to discuss the draft agreement and unilaterally cancelled the project less than three weeks after initiating the permit application process does not detract from the City's efforts to proceed in an expeditious and reasonable fashion.